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In the Supreme Court of the United States

Term, 1970

No. 1228

STATE REAL ESTATE COMMISSION

vs.

LENERTE ROBERTS,

Appellant

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

J. Leon Rabben, Esquire, on behalf of the defendant, Lenerte Roberts, prays that a writ of certiorari issue to review the judgment of the Pennsylvania Supreme Court entered in the above case on November 12, 1970.

1. The opinions delivered in the Courts below, copies of which are appended hereto, consisted of

(a) Adjudication and Order of the Pennsylvania State Real Estate Commission dated March 21, 1967 in Case No. 816, State Real Estate Commission vs. Lenerte Roberts, which suspended the defendant's real estate broker's license and imposed additional conditions for reinstatement (not reported in any official reports).

(b) Opinion of the Court of Common Pleas of Dauphin County, Pennsylvania, dated October 31, 1968, being No. 190, Commonwealth Docket 1967, State Real Estate Commission v. Lenerte Roberts, affirming the action of the State Real Estate Commission, which is reported in 90 Dauphin 106 (1968).

(c) Per Curiam Order of the Superior Court of Pennsylvania dated November 12, 1969 which is reported in 215 Pa. Superior Court 492 (1969), which affirmed the action of the Dauphin County Common Pleas Court, and dissenting opinion.

(d) Majority opinion of the Pennsylvania Supreme Court dated November 12, 1970, which does not yet ap-

pear in the official reports, and which affirmed the decision of the Pennsylvania Superior Court, and the dissenting opinion pertaining thereto.

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2. The grounds on which the jurisdiction of this Court is invoked are:

(a) The judgment or decree sought to be reviewed was dated and entered by the Pennsylvania Supreme Court on November 12, 1970.

(b) No order was made respecting a rehearing, nor was any order made granting an extension of time within which to petition for a certiorari.

(c) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari, appears in the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C.A., Section 1257, as follows:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By Writ of Certiorari, . . . where the validity of a State Statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held, or authority exercised under, the United States."

3. The questions presented for review are:

(a) Where the defendant refused to permit an investigator or a State administrative agency to examine his records, without any formal order for their production, and without any Court subpoena, is such refusal protected by the prohibition against unreasonable searches and seizures and compulsory self-incrimination contained in the Pennsylvania and United States Constitutions?

(b) Where the State Real Estate Commission acted as investigator, prosecutor, judge and jury, and did not follow the statutory procedures provided, was the defendant denied the due process required by the Pennsylvania and United States Constitutions?

(c) Did the defendant waive his constitutional privileges under the Pennsylvania and United States Constitutions, by accepting a license to do business as a real estate broker?

(d) Did the "required records" doctrine enunciated in *Shapiro vs. U. S.*, 335 U.S. 1, require the defendant to permit an investigator for an administrative agency to examine his records?

(e) Was the Pennsylvania Real Estate Brokers License Act as interpreted by the Pennsylvania Supreme Court and as applied by the Pennsylvania Real Estate Commission, and the procedures employed to suspend the defendant's real estate broker's license, an unconstitutional exercise of the police power?

4. This case involves the following constitutional provisions, statutes, and regulations, the pertinent texts of which are set forth in the Appendix.

(a) Pennsylvania Real Estate Brokers License Act of May 1, 1929, P. L. 1216, Sections 10 and 13, 63 P.S. Section 431, et seq.

(b) State Real Estate Commission Rules of Practice and Procedure 4.1, 4.3 (3), 10.19.

(c) Pennsylvania Administrative Agency Law of 1945, P. L. 1388, Section 44, 71 P.S. Section 1710.44.

(d) Pennsylvania Constitution, Article 1, Section 9; Article 3, Section 22; and Article 8, Section 10.

(e) United States Constitution, Amendments 4, 5, and 14.

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5. This case arose as the result of the refusal of the defendant, a licensed real estate broker, to permit an investigator of the Pennsylvania Real Estate Commission to examine his records. The Commission never issued any subpoena or other formal order for their production, nor was the investigator's request ever presented to any Court for a determination of its reasonableness or its validity, prior to penalties being imposed.

The State Real Estate Commission construed this to be a violation of the Real Estate Brokers License Act, and after a hearing at which it acted as prosecutor, judge and jury, heard the testimony of its investigator, and suspended the defendant's license for six months and directed that he submit his records for examination as a condition of reinstatement. The defendant did not testify at the hearing.

On appeal to the Dauphin County Common Pleas Court, the defendant's counsel argued the constitutional

questions stated above, but they were rejected by that Court which affirmed the action of the administrative agency.

Appeal was then taken to the Pennsylvania Superior Court which by a vote of 4 to 3 affirmed the Dauphin County Court, per curiam, with a dissenting opinion by three judges.

On appeal to the Pennsylvania Supreme Court, such Court, by a 5 to 2 vote, affirmed the Superior Court, with a dissenting opinion by two justices.

The Federal questions sought to be now reviewed were raised in the first instance by written exceptions to the adjudication, findings and order of the State Real Estate Commission, as well as by objections orally made at the hearing before such administrative agency. The exceptions formed the basis for the appeal to the Common Pleas Court of Dauphin County, which was the first court of record to consider this case. The same questions were raised and argued in each succeeding appeal, i.e., to the Pennsylvania Superior Court and to the Pennsylvania Supreme Court. They were considered and rejected by the rulings and opinion of the majority of each of the tribunals above referred to. Reference thereto appears in the record as follows:

(a) At the hearing before the State Real Estate Commission (printed record in the State Court, pages 23a to 28a inclusive, 31a to 34a inclusive, 36a and 37a).

(b) Exceptions to adjudication and order of State Real Estate Commission (printed record in the

State Court, pages 52a and 53a). These were argued before the Dauphin County Common Pleas Court.

(c) Discussion of constitutional questions in opinion of Dauphin County Court (printed record in the State Court, pages 61a to 64a inclusive).

(d) Statement of questions involved in Appellant's brief in Pennsylvania Superior Court, and discussion of constitutional questions in dissenting opinion of minority of Superior Court, reported in 215 Pa. Superior Court 492, et seq. (1969).

(e) Statement of questions involved in Appellant's brief in Pennsylvania Supreme Court, and discussion of constitutional questions in majority opinion and dissenting opinion of Pennsylvania Supreme Court decision.

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6. The writ of certiorari prayed for should be allowed for the following special and important reasons:

(a) The State Court has decided Federal questions in a way probably not in accord with applicable decisions of this Court as pointed out in the dissenting opinion of the Pennsylvania Supreme Court in the instant case. Those questions include the following:

(1) Does the acceptance of a license to engage in a business constitute a waiver of the constitutional privilege against self-incrimination? The State Supreme Court held that it did. This Court on the other hand held that it did not, in *Garrity vs. New Jersey,* 385 U.S. 493, 496, 497, 500 (1967); *Spevack vs. Klein,* 385 U.S. 511, 516 (1967); *Gardner vs. Broderick,* 392 U.S. 273 (1968).

(2) May a businessman constitutionally refuse to permit an investigator of an administrative agency to examine his records without a formal subpoena or order? The State Supreme Court held that he may not. This Court, on the other hand, held that he may, in *See vs. City of Seattle,* 387 U.S. 541, 544, 545 (1967); reaffirmed in the *Colonade Catering Corp. vs. U. S.*, 397 U.S. 72, 1970.

(3) Does the "required records" doctrine enunciated in *Shapiro vs. U. S.,* 335 U.S. 1, apply to every individual who enters a field required to be licensed by the State, and thus require him to surrender his constitutional guarantees against unreasonable searches and seizures, and against self-incrimination. The State Supreme Court held that it did. This Court on the other hand, held that it did not, in *Marchetti vs. U. S.,* 390 U.S. 39, 55 (1968); *Grosso vs. U. S.,* 390 U.S. 62, 67, 68 (1968); *Haynes vs. U. S.,* 390 U.S. 85 (1968); *Leary vs. U.S.,* 395 U.S. 6, 13 (1969).

(b) This case involves the question of whether due process is violated by an administrative agency acting as investigator, prosecutor, judge and jury.

(c) The resolution of the above questions are of great public importance in establishing the limits of the authority and current procedures of administrative agencies as opposed to the constitutional rights of the individuals.

(d) As a result of the decision of the Pennsylvania Supreme Court in this case, the defendant and others similarly situated, have been and will be unjustly deprived of their livelihood to their economic disaster, in violation

of their constitutional rights and contrary to the decisions of this Court.

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

J. LEON RABBEN,
Attorney for Petitioner.

APPENDIX

ADJUDICATION AND ORDER OF PENNSYLVANIA STATE REAL ESTATE COMMISSION

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
COMMISSION OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS

BEFORE THE STATE REAL ESTATE COMMISSION

Case No. 816

In the Matter of the Suspension or Revocation
of the License to Practice as a Real Estate Broker
No. 5421, Issued February 25, 1936
To
Lenerte Roberts

ADJUDICATION AND ORDER

JOHN W. BRUCKER,
Chairman.

State Capitol
Harrisburg, Pennsylvania.

HISTORY

This case comes before the State Real Estate Commission on its Citation to determine whether Lenerte Roberts, hereinafter referred to as Respondent, violated the Real Estate Brokers' License Act of May 1, 1929, P. L. 1216, as amended, Section 10(a), subsection (II) (iii) (iv) and (v), 63 P.S. 440(a), subsection (II) (iii) (iv) and (v).

In response to the Citation and to a Notice of Hearing issued to the Respondent in accordance with Section 10(b) of the aforesaid Act, 63 P.S. Section 440(b) and the Administrative Agency Law of June 4, 1945, P. L. 1388, as amended, 71 P.S. 1710.1 et seq., the Respondent appeared in person before the State Real Estate Commission on Tuesday, December 20, 1966, in Harrisburg, Pennsylvania, to answer the charges contained in the Citation.

These charges allege that Respondent did not conduct himself in accordance with the requirements of the Real Estate Brokers' License Act and Supplementary Rules and Regulations in the following:

1. Failing to maintain books and records of real estate transactions, as required;

2. Failing to properly maintain an escrow account as required;

3. Refusing to permit proper authorized personnel of the State Real Estate Commission to inspect records of transactions and funds.

Hence, these charges form the basis for the conclusion of the Citation that Respondent is subject to the pro-

visions of the Real Estate Brokers License Act, supra, which provides, inter alia:

> (II) Of failure to comply with the following requirements:
>
> . . .
>
> (iii) A real estate broker shall not commingle the money or other property of his principal with his own.
>
> (iv) Every real estate broker shall immediately deposit such moneys, of whatever kind or nature, belonging to others, in a separate custodial or trust fund account maintained by the real estate broker with some bank or recognized depository until the transaction involved is consummated or terminated, at which time the real estate broker shall account for the full amount received. Under no circumstances shall a real estate broker permit any advance payment of funds belonging to others to be deposited in the real estate broker's business or personal account, or to be commingled with any funds he may have on deposit.
>
> (v) Every real estate broker shall keep records of all funds deposited therein, which records shall indicate clearly the date and from whom he received money, the date deposited, the dates of withdrawals and other pertinent information concerning the transaction, and shall show clearly for whose account the money is deposited and to whom the money belongs. All such records and funds shall be subject to inspection by the Commission . . ."

Adjudication of State Real Estate Commission

The following members of the State Real Estate Commission were present at the hearing:

Samuel Saxton, Chairman
John W. Brucker, Vice-Chairman
Robert L. Messic
Albert M. Comly
John P. Judge, Commissioner of Professional and Occupational Affairs

The Commission was represented by Morris Chernock, Esquire, Assistant Attorney General.

The Respondent was represented by L. Leon Rabben, Esquire, 250 Suburban Station Building, Philadelphia, Pennsylvania and Samuel Dashiell, Esquire, 811 East Penn Square, Philadelphia, Pennsylvania.

It is to be noted that the Citation and Notice of Hearing, set a hearing date for November 22, 1966, in Harrisburg, Pennsylvania. The hearing was continued at request of Respondent's counsel and was held as indicated above on Tuesday, December 20, 1966, in Harrisburg (N.T. 6, 7).

The Respondent did not offer any testimony in his behalf, nor did he testify in his own behalf (N.T. 30, 32, 35, 36).

FINDINGS OF FACT

1. The 1966 renewal, No. 5845, of real estate broker's license, No. 5421, issued to Lenerte Roberts, Respondent on February 25, 1936 is in force up to the present time.

2. The Citation and Notice of Hearing was forwarded to the Respondent pursuant to the provisions of Section 10(b) of the Real Estate Brokers Act of May 1, 1929, P. L. 1216, as amended, 63 P.S. 440 and the Administrative Agency Law of June 4, 1945, P. L. 1388, as amended, 71 P.S. 1710.1 et seq.

3. The Citation and Notice of Hearing was received by the Respondent (N.T. 5, 6).

4. The hearing was continued from November 22, 1966, to December 20, 1966, at the request of counsel for Respondent and notice of the continued hearing was received by Respondent (Exhibit C-3, N.T. 7).

5. The Respondent appeared in person and was represented by counsel at the hearing held on Tuesday, December 20, 1966 (N.T. 4).

6. An investigator employed by the Commission of Professional and Occupational Affairs to make routine inspections and special investigations on behalf of the State Real Estate Commission made four visits to inspect the real estate office of the Respondent (N.T. 8, 9).

7. The purpose of these visits was to "pay special attention to the escrow account" (N.T. 13, 14, 15).

8. Inspections on the four visits referred to above could not be made because Respondent was not in (N.T. 8).

9. Although the investigator left messages with employees of Respondent that Respondent communicate with him, he failed to do so (N.T. 11).

10. On June 2, 1965, the aforesaid investigator upon identifying himself was refused permission by Re-

spondent to inspect his escrow account and office (N.T. 9).

DISCUSSION

As indicated above, the Respondent was cited for his failure to maintain books and records of real estate transactions, failing to maintain an escrow account as required, and refusing to permit authorized personnel of the State Real Estate Commission to inspect records of transactions and funds.

The basis for the action against the Respondent is contained in Section 10(a) Subsection (II) (iii) (iv) and (v) of the Real Estate Brokers' License Act of May 1, 1929, P. L. 1216, as amended, 63 P.S. 110.

The testimony clearly indicates the Respondent refused to permit a representative of the State Real Estate Commission to inspect his records and funds. This refusal was based on advice from Respondent's counsel that "there was nothing in the Real Estate Law or Act that compelled him to permit such an inspection . . ." (N.T. 9).

Section 10(a) subsection (II) (v) provides:

> "Every real estate broker shall keep records of all funds deposited therein, which records shall indicate clearly the date and from whom he received money, the date deposited, the dates of withdrawals, and other pertinent information concerning the transaction, and shall show clearly for whose account the money is deposited and to whom the money belongs. *All such records and funds shall be subject to in-*

spection by the Commission . . ." (Underscoring supplied.)

Without going into the merits of Respondent's counsel's advice to him, the Respondent failed to comply with the requirement as stated above.

The State Real Estate Commission although it did not do so believes that findings could be made to the effect that Respondent did not maintain books and records of real estate transactions or escrow accounts. These findings could be based on inferences to be drawn from positive testimony that Respondent refused an inspector for the State Real Estate Commission permission to examine any records.

The State Real Estate Commission has reviewed and considered the legal position taken by Respondent through his counsel and finds them to be without merit.

CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact and Discussion, the State Real Estate Commission, concludes as follows:

1. The State Real Estate Commission has jurisdiction in this case.

2. The Respondent was notified of the charges against him and given ample opportunity to be heard.

3. Failure on the part of the Respondent to permit an investigator for the State Real Estate Commission to examine his records and funds as set forth in Findings of Fact Nos. 6 to 10 inclusive constitutes a violation of Sec-

tion 10(a) Subsection (II) (v) of the Real Estate Brokers' Act, supra, 63 P.S. Section 440(a) Subsection (II) (v).

4. Sufficient cause exists for the suspension of Respondent's license as a real estate broker.

ORDER

And Now, to wit, this 21st day of March, 1967 on the basis of the aforementioned Findings of Fact and Conclusions of Law, considered separately and independently of each other, the State Real Estate Commission having duly convened and considered these entire proceedings, upon vote of its members, hereby orders that the license to practice as a Real Estate Broker, No. 5421, issued February 25, 1936, to Lenerte Roberts be, and the same is, hereby suspended for a period of six (6) months, such suspension to become effective thirty (30) days from the date of the mailing hereof, said date of mailing being April 19, 1967, and further, that as a condition for reinstatement of his license at the expiration of said suspension period, the said Lenerte Roberts, shall permit inspection of his funds and records and produce all necessary documents and evidence to show compliance with the escrow provisions of the Real Estate Brokers' License Act and the Rules and Regulations of the State Real Estate Commission.

By Order:
State Real Estate Commission
John Wm. Brucker,
Chairman.

OPINION OF COURT OF COMMON PLEAS OF DAUPHIN COUNTY

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

No. 190 Commonwealth Docket, 1967

State Real Estate Commission,

Appellee

v.

Lenerte Roberts,

Appellant

OPINION

By the Court:

This is an appeal from the Adjudication and Order of the State Real Estate Commission suspending the license of the Appellant, Lenerte Roberts, for a period of six months. The Order also directed

> "that as a condition for reinstatement of his license at the expiration of said suspension period, the said Lenerte Roberts, shall permit inspection of his funds and records and produce all necessary documents and evidence to show compliance with the

escrow provisions of the Real Estate Brokers' License Act and the Rules and Regulations of the State Real Estate Commission."

The facts in this case are substantially as follows: An investigator employed on behalf of the State Real Estate Commission was given an assignment to make a routine inspection of the Appellant's real estate office with instructions to "pay special attention to the escrow account". Pursuant to this assignment, the investigator made four attempts to inspect the Appellant's office records but was not able to do so because he was absent on each occasion.

During these visits the investigator identified himself to Appellant's secretary, declared the purpose of his visit, left a telephone number where he could be reached, and requested that the secretary relay this information to Mr. Roberts. The Appellant never contacted the investigator. On a later visit the investigator spoke with the Appellant's wife, again identified himself, stated his purpose and requested that Appellant contact him so that an appointment could be made for an inspection. Again the Appellant failed to respond. Finally, the investigator made his fifth visit. This time Appellant was present but refused to allow the investigator to make an inspection of his escrow account, stating that his attorney had "advised him there was nothing in the Real Estate Law or Act that compelled him to permit such an inspection by me or any one else, and on the basis of this he would not permit such an inspection."

Pursuant to this refusal, the Commission, *upon its own motion,* issued a Citation to the Appellant charging,

inter alia, that he violated Section 10(a) (11) (v) of the Real Estate Brokers' License Act of May 1, 1929, P. L. 1216, as amended (63 P.S. 440(a)) by so refusing.

A hearing was held at which the investigator and the Secretary of the Commission were the only witnesses. Appellant was present and was represented by counsel but refused to testify. When the Board attempted to ascertain whether Appellant had an escrow account and whether his counsel would put him on the stand, counsel replied: "No, I have nothing to put him on the stand for". (N.T. 30) Thereafter counsel for Appellant again stated: ". . . I would not be willing to put him on as a witness at this time." (N.T. 32) Later, when the Chairman of the Commission indicated that some of its members would like to ask Appellant some questions, Appellant's counsel stated he would object to that (N.T. 35, 36, 37).

Although the Appellant offered no evidence in his behalf, his counsel suggested at the hearing that there was an additional fact which he claimed has a bearing on this case. On August 11, 1963 (three years prior to the institution of the present action) the Commission served the Appellant with a copy of a Complaint against him filed with the Commission by Robert Secundy. Appellant filed an Answer thereto but apparently the proceedings were subsequently discontinued. Appellant contends that there is a connection between the Secundy Complaint and the present Citation and, with this in mind, requested a Bill of Particulars upon receiving the present Citation. Appellant's request was refused on the ground that the Citation was adequate to give Appellant sufficient notice of the charges against him. Neither the Citation nor the Adjudication makes any reference to the Secundy Complaint.

Opinion of Court of Common Pleas

The Citation alleged that Appellant did not conduct himself in accordance with the requirements of Section 10(a) of the Real Estate Brokers' License Act of May 1, 1929, P. L. 1216, as amended, supra (63 P.S. 440(a)), in that he failed to maintain books and records of real estate transactions, failed to properly maintain an escrow account, and refused to permit proper authorized personnel of the State Real Estate Commission to inspect records of transactions and funds.

Section 10(a) of the said Act provides in pertinent part as follows:

> "(a) The Commission may, *upon its own motion,*[1] and shall, promptly, upon the verified complaint in writing of any person setting forth specifically the wrongful act or acts complained of, investigate any action or business transaction of any licensed real estate broker or real estate salesman; and shall have the power temporarily to suspend or permanently to revoke licenses theretofore issued by the department, under the provisions of this act, at any time when, after due proceedings as hereinafter provided, it shall find the holder thereof to have been guilty, . . .
>
> "(11) Of failure to comply with the following requirements: . . .
>
> "(iii) A real estate broker shall not commingle the money or other property of his principle with his own.

---

[1]Emphasis throughout ours unless otherwise noted.

"(iv) Every real estate broker shall immediately deposit such moneys, of whatever kind or nature, belonging to others, in a separate custodial or trust fund account maintained by the real estate broker with some bank or recognized depository until the transaction involved is consummated or terminated, at which time the real estate broker shall account for the full amount received. Under no circumstances shall a real estate broker permit any advance payment of funds belonging to others to be deposited in the real estate broker's business or personal account, or to be commingled with any funds he may have on deposit.

"(v) Every real estate broker shall keep records of all funds deposited therein, which records shall indicate clearly the date and from whom he received money, the date deposited, the dates of withdrawals, and other pertinent information concerning the transaction, and shall show clearly for whose account the money is deposited and to whom the money belongs. *All such records and funds shall be subject to inspection by the commission.* Such separate custodial or trust fund account shall designate the real estate broker, as trustee, and such account must provide for withdrawal of funds without previous notice."

The Commission found, inter alia, that its investigator was refused permission by the Appellant to inspect his escrow account and records and that such refusal constituted a violation of Subsection (11) (v) of Section 10(a) of the Real Estate Brokers' License Act of 1929, P. L. 1216, as amended, supra (63 P.S. 440(a) and Subsection

(11) (v)). Accordingly, the Commission suspended Appellant's license, as above stated. Appellant then appealed to this Court[2] and filed nine Exceptions to the Commission's Adjudication and Order.

DISCUSSION

The scope of judicial review in cases arising out of appeals from adjudications of the Pennsylvania State Real Estate Commission is governed by The Administrative Agency Law, Act of June 4, 1945, P. L. 1388, §44 (71 P.S. 1710.44). That Act provides:

> ". . . the court shall affirm the adjudication unless it shall find that the same is in violation of the constitutional rights of the appellant, or is not in accordance with law, . . . or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence."

Appellant's first Exception avers that

> "No evidence was offered to prove the Complaint filed in this case, nor was the Complaint itself offered in evidence."

The second Exception alleges:

> "The Citation . . . was not based upon and had no relation to the Complaint which initiated this proceeding, but in fact related to acts occurring approximately two years after the Complaint was filed."

---

[2]A Supersedeas was granted, pursuant to Appellant's petition, to which the State Real Estate Commission made no objection.

These Exceptions are without merit. The evidence in the record is to the effect that no Complaint initiated this proceeding but that the Commission acted *on its own motion* in ordering a routine investigation, as it had the right to do under Section 10(a) of the Real Estate Brokers' License Act. See also Verona vs. Schenley Farms Co., Aplnt., 312 Pa. 57, at p. 64 (1933).

The third Exception alleges the Citation did not give Appellant sufficient notice of the charge against him. The Citation charges, as heretofore stated, that Appellant failed to maintain books and records of his real estate transactions; failed to maintain properly an escrow account and refused to permit the Commission's investigator to inspect his records of transactions and funds. We think the Citation gave Appellant ample notice of the charges against him and that this Exception must be dismissed. For the same reason Exception No. 7 cannot stand. There was no need for the Commission to furnish a Bill of Particulars under the circumstances.

Exception No. 4 avers that

> "The Findings of Fact and Conclusions of Law are not supported by such competent and substantial evidence as is required under the law."

An authorative definition of "substantial evidence" is given in Pennsylvania Labor Relations Board v. Kaufman Department Stores, Inc., 345 Pa. 398 (1942). There the Court stated (p. 400) that substantial evidence is

> ". . . evidence sufficient to convince a reasonable mind to a fair degree of certainty . . . [it] is more than a mere scintilla. It means such relevant

> evidence as a reasonable mind might accept as adequate to support a conclusion. [It] . . . must do more than create a suspicion of the existence of the fact to be established."

See also Pennsylvania State Board of Medical Education and Licensure v. Schireson, 360 Pa. 129 (1948).

The basis of this Exception, as stated in the Appellant's Brief, appears to be that the Commission may investigate only conduct in connection with a real estate transaction to determine the existence of incompetency, bad faith or dishonesty and that since the Appellant did not engage in a "real estate transaction" with another person, the Commission had no power to inspect his records and determine whether in fact he had established an escrow account.

In support of this proposition the Appellant cites Real Estate Commission v. Tice, 79 Dauphin 75, 85, 86 (1962). It must be conceded that there is language in that opinion which supports in some degree the sweeping contention Appellant asserts. The stark fact remains, however, that the Tice case was reversed by the Superior Court of Pennsylvania in State Real Estate Commission, Aplnt. v. Tice, 200 Pa. Superior Ct. 553 (1963).

A review of the record clearly shows that Appellant's Exception No. 4 is without merit. The investigator for the State Real Estate Commission testified at length that he made repeated attempts, without success, to contact Appellant to conduct a routine investigation and determine whether he had established an escrow account and that finally the Appellant personally refused to permit such an investigation. There was clearly "competent and

substantial evidence" to support the Commission's Findings of Fact and Conclusions of Law.

Exception No. 5 apparently refers to the Secundy Complaint, heretofore discussed, which has no connection with this case. It must be dismissed because it is nothing more than a conclusion of law which the record does not substantiate. There is no evidence to support the averments in this Exception which states:

> "The Commission had within its possession, or control, or available to it, evidence which effectively disproves the charges of which it found the defendant guilty and improperly withheld such evidence from the hearing."

Exception No. 6 alleges that the Findings of Fact are insufficient under the law to support the Order of Suspension. The Order is based on a Finding of Fact that the Commission's investigator was refused permission by Appellant to inspect his escrow account and office. The testimony establishes a definite violation of Section 10 (a) and Subsection (11) (v) which provides, as above stated, that "All such records and funds *shall be subject to inspection* by the Commission." This Exception cannot be sustained.

Exception No. 8 complains of

> "The refusal of the Commission to permit counsel for the defendant to ascertain whether its Rules of Practice and Procedure were properly complied with in . . ."

The appellant was given adequate notice of the charges against him and a fair hearing at which he offered

no evidence. Under the circumstances, we fail to see how the Appellant was harmed by the Commission's refusal of his request to engage in a fishing expedition to determine whether it had followed its Rules of Practice and Procedure prior to holding a hearing.

As stated in State Board of Medical Education and Licensure v. Harney, 60 Dauphin 204, 208 (1949) the general rule is

> ". . . that, in the absence of evidence to the contrary, it will be presumed that an administrative board properly performed its duties, 42 Am. Jur. 680, Public Administrative Law, Section 240."

Due process does not guarantee any vested right in any particular remedy or form of proceeding, only substantial rights are protected. 1 Am. Jur. 2d Administrative Law, Section 149, p. 956.

In the instant case, Appellant's counsel at the hearing attempted to probe and attack the practice and procedure of the Commission and was apparently attempting to ascertain whether the Commission had submitted the matter in question, before it issued a notice of hearing, to its representative in the Department of Justice. The Deputy Attorney General properly objected to this tactic as being irrelevant and diversionary. It may be noted, moreover, that "Failure of the agency to submit the matter to the Department of Justice shall not invalidate any adjudication." Act of 1945, June 4, P. L. 1388, §36, added 1951, September 28, P. L. 1561, §4 (71 P.S. 1710.36).

Exception No. 9 alleges that

> "The defendant's constitutional rights to due process and against self-incrimination were disregarded by the Commission."

Appellant's position seems to be that a "routine investigation" (even though the investigator was directed to pay special attention to the escrow account) cannot be used as the basis for an inspection of his records to determine whether he had established an escrow account. In his Brief he says "the Act does not authorize the so-called general investigation on its own motion which was attempted here" and that under the circumstances the Commission's attempt to find out whether he had an escrow account constituted a violation of his right against self-incrimination as guaranteed in the Fifth Amendment to the Federal Constitution and Article I, Section 9 of the Pennsylvania Constitution.

The determination of Appellant's contention involves a consideration of the "Required Records Doctrine" which was firmly established in Shapiro v. United States, 335 U.S. 1 (1948). That doctrine holds that where certain records are required to be kept by a valid statute, a provision in that statute for the compulsory production of those "required records" does not violate the constitutional privilege against self-incrimination. The United States Supreme Court in Shapiro, at page 17, quoted from Davis v. United States, 328 U.S. 582, 590 (1946):

> ". . . The principle applies not only to public documents in public offices, *but also to records required by law to be kept* in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."

This doctrine is applicable in the present case. The Real Estate Brokers' License Act, supra, was enacted to correct serious abuses, including the failure of real estate brokers to maintain proper escrow accounts.

The urgent need for legislation to protect the public was stated in a scholarly opinion written by Mr. Justice William B. Linn in Verona v. Schenley Farms Co., Aplnt., 312 Pa. 57 (1933). There it was stated: (pp. 64-65)

> "*The obvious purpose* of the Act of 1929 is *to prevent fraud* and public wrong by correcting well recognized mischief theretofore existing. Numerous illustrations of the wrong to be corrected appear in reported decisions of both appellate courts, which, as the matter is familiar, need not be specifically referred to. *The legislature concluded that the time had arrived when the subject must be dealt with.* . . .[3]
>
> "In determining the meaning of the act, it is necessary to consider the evils which the act was obviously designed to correct: Provident Life and Trust Co. v. Klemmer, 257 Pa. 91, 93, 101 A. 351. *As a statute for the prevention of fraud, it must be liberally construed* to effect the purpose: Nolan v. Jones, 67 Pa. Superior Ct. 430; 263 Pa. 124, 106 A. 235. Plaintiff's contention that the statute is *penal* and must therefore be strictly construed, *overlooks*

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[3]A footnote on page 64 cites Semenow, Pennsylvania Law of Real Estate Brokerage, page 132, et seq., wherein is set forth a large variety of fraud and other wrongful acts, *including embezzlement of down money*, which the Real Estate Brokers' License Act of 1929 was designed to prevent.

> *the settled rule* that 'there is no impropriety in putting a literal construction on a penal clause and a liberal construction on a remedial clause' in the same statute: Com. v. Shaleen, 215 Pa. 595, 64 A. 797. In considering its meaning, it is *also important* to note that the requirement of the license is in aid of the collection of the revenue payable by brokers pursuant to the Act of 1907, supra. It is settled that 'statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, are *not* to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature': United States v. Stowell, 133 U.S. 1, 12; United States v. Ryan, 284 U.S. 167."

The requirement of the Real Estate Brokers' License Act that brokers maintain proper records and escrow accounts in real estate transactions is an "appropriate subject of governmental regulation." Since such records qualify as "Required Records", they are not subject to a defense which invokes the privilege against self-incrimination. Accordingly, Appellant's Exception No. 9 must be dismissed. See also Commonwealth v. Schneier, 80 York 1 (1966); 1 Davis-Administrative Law, §3.09, p. 203; 21 Am. Jur. 2d, Criminal Law, §355, at p. 382.

ORDER

And Now, October 31, 1968, the Appeal of Lenerte Roberts from the Adjudication and Order of the State Real Estate Commission suspending Appellant's real estate license is dismissed.

HOMER L. KREIDER,
P. J.

PER CURIAM ORDER AND DISSENTING OPINION OF PENNSYLVANIA SUPERIOR COURT

OPINION OF THE SUPERIOR COURT
(215 Pa. Superior Ct. 492 (1969))

Per Curiam, Filed: November 12, 1969:

Order affirmed.

Hoffman, J. files a dissenting opinion in which Spaulding and Cercone, JJ. join.

Dissenting Opinion by Hoffman, J., Filed: November 12, 1969.

This is an appeal by a real estate broker from a six month suspension of his license by the State Real Estate Commission.

Since 1936, appellant has been licensed under the Real Estate Brokers License Act of 1929, Act of May 1, 1929, P. L. 1216, as amended, 63 P.S. Sec. 431 et seq. He has been a relator in the City of Philadelphia since 1944.

In June, 1965, an investigator for the Commission appeared, without prior notice, at appellant's place of business and asked to inspect appellant's escrow account. The investigator said the inspection was routine. Appellant, on the advice of counsel, did not allow the investigator to examine his account.

Because of this refusal, a citation was issued to appellant directing him to appear before the Commission to

determine whether he had violated Section 10(a) of the Act.[1] A hearing was held, at which only the investigator testified.

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[1]Section 10(a) provides, in part:

"(a) The commission . . . shall have power to suspend or permanently to revoke licenses . . . when . . . it shall find the holder thereof to have been guilty.

"(1) Of knowingly making any substantial misrepresentations; or

"(2) Of knowingly making any false promise . . .; or

"(3) Of a continued . . . course of misrepresentation . . .; or

"(4) When . . . the licensee . . . has pleaded guilty (to certain crimes) . . .

"(5) Of any failure to account for . . . moneys belonging to another . . .; or

"(6) Of any misleading or untruthful advertising; or

"(7) Of any act . . . which demonstrates incompetency . . .;

"(8) Of displaying (certain signs) without an exclusive agency therefor or without the owner's consent; or

"(9) Of failing to furnish voluntarily a copy of the agreement of sale . . .; or

"(10) Of buying a property listed through a straw party with the intent (to make a secret profit); or

"(11) Of failure to comply with the following requirements:

"(i) All deposits . . . must be retained . . . pending consummation or termination of the transaction . . . and shall be accounted for . . .

"(ii) Every real estate salesman . . . shall pay over the deposit to the real estate broker.

"(iii) A real estate broker shall not commingle the money or other property of his principal with his own.

"(iv) Every real estate broker shall immediately deposit such moneys . . . belonging to others, in a separate custodial or trust fund (escrow account) . . .

The Commission concluded as follows:

"Failure on the part of the (appellant) to permit an investigator for the State Real Estate Commission to examine his records and funds . . . constitutes a violation of Section 10(a) Subsection (11) (v)."

The Commission suspended appellant's license for six months and conditioned its reinstatement upon his allowing inspection of his books and records. The Court of Common Pleas of Dauphin County denied appellant's appeal. An appeal to this Court followed.

The question presented by this appeal is whether refusal by a broker to allow an investigator of the Commission to examine his escrow account, standing alone, constitutes a violation of Section 10(a), Subsection 11(v) of the Act, sufficient to justify the suspension or revocation of a real estate license.

License suspension or revocation is an economic disaster for the licensee. It deprives him of his livelihood and diminishes him in the eyes of both the members of his profession and the community in which he works. This is particularly severe for the real estate broker who must depend upon the support of both for his continued existence. Should he ever regain his license, his image is tarnished. Thus, the licensee's future is jeopardized when

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"(v) Every real estate broker shall keep records of all funds deposited therein (escrow account) . . . All such records and funds shall be subject to inspection by the commission . . .

"(12) Of failure to provide . . . copy of any sole or exclusive sales listing contract . . .

"(13) (False application for a license).

"(14)-(17) (Discriminatory practices)."

the Commission invokes Section 10(a) and suspends or revokes his license.

It is my view, therefore, that the severe sanction of license suspension and revocation should not be imposed lightly. The right to suspend must be based on the clear mandate of the legislature.

The Courts of the state have repeatedly emphasized that Section 10(a) of the Act is penal in nature. See Penna. St. R. E. Com'n v. Keller, 401 Pa. 454, 165 A. 2d 79 (1960); Trott v. Hild, 190 Pa. Superior Ct. 85, 151 A. 2d 832 (1959). As such, the law compels us to construe 10(a) strictly. Statutory Construction Act, Act of May 28, 1937, P. L. 1019, art. IV, Sec. 58, 46 P.S. Section 558.

Section 10(a) contains seventeen pertinent subsections, describing acts which, when committed by a licensed real estate broker, may be grounds for suspension or revocation of his license. See note 1, supra. Sixteen of the seventeen subsections merely describe the prohibited acts.

Subsection 11, however, not only describes the prohibited act of commingling the principal's funds with the broker's, but also provides the procedural method whereby such violation must be avoided. The broker is required to keep the funds separate by maintaining an escrow account. In order to assure that brokers are complying with this statutory requirement, the subsection provides that escrow accounts shall be subject to inspection by the commission.

It is not clear, however, whether refusal to allow such inspection is a sufficient ground for suspension and

revocation of licenses. The refusal may be based on numerous unexplained reasons. Certainly, refusal alone to submit to an inspection does not prove that the broker has commingled funds, which is the violation Subsection 11 seeks to prohibit. Rather, the position of the inspection clause within Section 10(a), and Subsection 11 in particular, would seem to indicate that it was intended merely as an aid to the Commission rather than as a separate and distinct basis for suspension and revocation.

This conclusion is confirmed by another section of the Act. Section 13 grants the Commission the power to *subpoena* records. 63 P.S. Sec. 443.[2] Should a broker fail to comply with the subpoena, a court of common pleas may enforce it. The broker may explain his grievance in court and will, at least, receive a judicial determination of his grievance. At the same time, if its motives are legitimate, the Commission will have access to the broker's records. We should not permit the Commission to short-circuit this section by the threat of license suspension or revocation.[3]

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[2]"(a) The commission . . . shall have power . . . to issue subpoenas for the attendance of witnesses and the production of books and papers . . .

"(b) Where in any proceeding before the commission any witness . . . shall refuse to produce any books and papers the production of which is called for by the subpoena, . . . the production of the books and papers required shall be enforced by any court of common pleas of this Commonwealth."

[3]It is not likely that many brokers will refuse an investigator's initial attempt at inspection. In most instances, the investigator's motives will be legitimate. He may be acting upon complaint or in accordance with a justifiable, standard checkup procedure. Hence, should the broker refuse inspection, in most in-

In summary, therefore, I do not accept the finding of the lower court that refusal to allow an inspection constitutes sufficient ground for revocation or suspension. In my opinion, such action must be based on proof of violations clearly enunciated by the Act. Inferences of guilt of such violations should not be drawn from incomplete evidence, as was done in this case. Rather, if the Commission suspects a failure to maintain an escrow account, it should prove such violation by utilizing the special subpoena power granted to it by the Act.[4]

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stances a court will enforce the Commission's subsequent subpoena. Refusal to allow inspection will usually result in the broker's having to attend a Commission proceeding, bring forth his records and will substantially interrupt his business.

[4]In view of my opinion in this case, I do not reach the constitutional issue whether such an investigation is constitutional in the absence of a warrant or subpoena issued by an authority for probable cause. It should be noted, however, that in See v. Seattle, 387 U.S. 541 (1967), the Supreme Court of the United States held that a constitutionally valid warrant procedure was prerequisite to administrative inspection of commercial premises. It drew support for its holding from the analogous administrative use of subpoenaes to inspect corporate books and records. The Court said:

"The (administrative) agency has the right to conduct all reasonable inspections of such documents (corporate books and records) which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while a demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." 387 U.S. at 544-545.

Similarly, in United States v. Stanack Sales Co., 387 F. 2d 849 (3rd Cir. 1968), the Circuit Court of Appeals reviewed the

I would reverse the order of the Court of Common Pleas of Dauphin County and remand the record to that court with directions to set aside the order of the Commission, after ordering restoration of his license. This decision would not bar the Commission, however, from further investigating this case in the manner suggested by this opinion.

Spaulding and Cercone, JJ., join in this Dissenting Opinion.

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convictions of two brothers, convicted of refusal to permit a Food and Drug Administration inspector to make a statutorily authorized inspection. The inspector had given the brothers notice of the inspection and indicated the inspection was routine, but had not given them a subpoena. Judge Biggs, speaking for the Court, said:

"It appears from the record before us that (the inspector) proceeded generally under the statute, without a carefully delimited subopena and only with a written notice of inspection filled out and served by (the inspector) himself. We conclude that . . . (the brothers') convictions cannot constitutionally stand." Id. at 852-853.

MAJORITY AND DISSENTING OPINION OF PENNSYLVANIA SUPREME COURT

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 32 May Term, 1970

State Real Estate Commission,

Appellee

v.

Lenerte Roberts,

Appellant

Appeal from the Order of the Superior Court at No. 54 March Term, 1969, Affirming Judgment of the Court of Common Pleas of Dauphin County at No. 190 Commonwealth Docket, 1967.

OPINION OF THE COURT

O'Brien, J., Filed: November 12, 1970.

Appellant is a licensed real estate broker, having been so licensed since 1936. The facts in this case are as follows:

An investigator employed on behalf of the State Real Estate Commission was given an assignment to make a routine inspection of the appellant's real estate office with instructions to "pay special attention to the escrow account". Pursuant to this assignment, the investigator made four attempts to inspect the appellant's office records but was not able to do so because appellant was absent on each occasion.

During these visits the investigator identified himself to appellant's secretary, declared the purpose of his visit, left a telephone number where he could be reached, and requested that the secretary relay this information to Mr. Roberts. The appellant never contacted the investigator. On a later visit the investigator spoke to the appellant's wife, again identified himself, stated his purpose and requested that appellant contact him so that an appointment could be made for an inspection. Again the appellant failed to respond. Finally, the investigator made his fifth visit. This time the appellant was present but refused to allow the investigator to make an inspection of his escrow account, stating that his attorney had "advised him there was nothing in the Real Estate Law or Act that compelled him to permit such an inspection by me or any one else, and on the basis of this he would not permit such an inspection".

Pursuant to this refusal, the commission, upon its own motion, issued a citation to the appellant charging, *inter alia,* that he violated Section 10(a)(11)(v) of the Real Estate Brokers License Act of May 1, 1929, P. L. 1216, as amended [63 P.S. 440(a)(11)(v)] by so refusing.

A hearing was held at which the investigator and the secretary of the commission were the only witnesses. The commission found, *inter alia*, that its investigator was refused permission by the appellant to inspect his escrow account and records and that such refusal constituted a violation of Subsection (11) (v) of Section 10(a) of the Real Estate Brokers License Act of 1929. The commission's order was appealed to the Court of Common Pleas of Dauphin County, which affirmed the commission and dismissed the appeal. An appeal to the Superior Court resulted in a per curiam affirmance of the Dauphin County Court, with Judge Hoffman filing a dissenting opinion, in which Judges Spaulding and Cercone joined. We granted allocatur.

The appellant alleges that the commission violated his constitutional rights against self-incrimination and unreasonable searches and seizures. What is involved in actuality is the right of the commission to examine the appellant's records without subpoenaing those records, and whether the refusal of a licensee to allow an investigator of the commission to examine his escrow account, standing alone, constitutes a violation of the Act of such nature as to justify suspension of the license.

The Real Estate Brokers License Act of 1929, as amended, 63 P.S. §431 et seq., provides in §10(a) as follows:

> "(a) The commission . . . shall have the power temporarily to suspend or permanently to revoke licenses . . . when . . . it shall find the holder thereof to have been guilty . . . (11) Of failure to comply with the following requirements . . . (v) Every real

> estate broker shall keep records of all funds deposited [in escrow accounts] . . . All such records and funds shall be subject to inspection by the commission."

Appellant, relying on the proposition that because the Act is penal, its provisions must be strictly construed, Pa. State Real Estate Comm. v. Keller, 401 Pa. 454, 165 A. 2d 79 (1960), first urges that the Act should not be read to permit a so-called general or routine investigation without any specific allegation or complaint charging wrongdoing.

However, the statute clearly states that the commission may "upon its own motion . . . investigate *any* action or business transaction of any licensed real estate broker or real estate salesman". (Emphasis supplied.) We believe "any action" means "any action", not just one where wrongdoing is suspected, otherwise the commission could not properly exercise its function of the comprehensive regulation of the business of selling real estate to others. Verona v. Schenley Farms Co., 312 Pa. 57, 167 Atl. 317 (1933).

Appellant next urges that the charge of failure to permit an investigator to examine records is not specifically listed as one of the grounds for revoking or suspending a license. It was this position which influenced the dissent of Judge Hoffman in the Superior Court. We do not agree with that interpretation. In our opinion, each of the requirements appearing in Subsection (11) of Section 10(a) of the statute is a separate ground for suspension of a real estate license. The appellant clearly failed to meet the requirement of Subsection (v) that "All such records and funds shall be subject to inspection by the commission."

Consequently, there is support for the commission's suspension order.

Appellant next urges that if our interpretation of the statute is correct, the statute is unconstitutional, because a provision compelling real estate brokers to produce their records violates the privilege against self-incrimination. The appellant relies on the case of See v. City of Seattle, 387 U.S. 541 (1967), where the Court said at page 544:

> "It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

We believe that appellant's case calls for invoking the "Required Record Doctrine", Shapiro v. United States, 335 U.S. 1 (1948), namely, that:

> "[T]he privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.' " (page 33)

See v. City of Seattle, supra, did not affect that doctrine. The opinion of Mr. Justice White, speaking for the majority, stated at pages 545 and 546:

> "We do not in any way . . . question such accepted regulatory techniques as licensing programs

> which require inspections prior to operating a business or marketing a product."

Appellant contends that he is a private individual conducting a private business and that there is nothing in the law that makes his business or his records "public". We cannot agree. Apparently, appellant does not fully understand the doctrine. In our view, the doctrine applies wherever an individual has voluntarily entered a field which requires licensing by the state. The mere act of entering or remaining in an activity that has become subject to a required recording or reporting of information, as here, where appellant voluntarily became a real estate broker knowing full well that he would be subject to the powers of the State Real Estate Commission to revoke or suspend his license for failure to comply with the statute governing his chosen profession, constitutes a waiver of the privilege against incrimination insofar as the license is concerned. See 65 Columbia Law Review 681, "Required Information and the Privilege Against Self-Incrimination", wherein it is stated at page 687:

> "[T]he choice to forego protection of the privilege is made by the individual when he decides to engage in the regulated activity. The apparent basis for this general waiver theory is that the individual who wishes to engage in an activity subject to regulation must accept the conditions incident thereto."

The appellant also argues, relying on Annenberg v. Roberts, 333 Pa. 203, 2 A. 2d 612 (1938), that the statute is unconstitutional because the commission's blanket request to see the appellant's escrow account would be an unreasonable search and seizure unless the appellant were

first given an opportunity to have a judicial determination of the reasonableness of the demands made by the inspector, as would be present if the commission were forced to proceed to issue a subpoena under Section 13 of the Act, 63 P.S. 443. What was said regarding a waiver of the Fifth Amendment under the required records doctrine also holds true for the Fourth Amendment.

In addition, the United States Supreme Court has said that for a search by an administrative agency to be reasonable, "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." United States v. Morton Salt Co., 338 U.S. 632 (1950).

Here, those three tests were met. The inquiry was, as we have already said, within the authority of the commission. The demand was definite. The inspector clearly informed the appellant that the purpose of the inspection was to verify appellant's escrow account. This was certainly relevant insofar as the statute required that such accounts be carefully kept. 63 P.S. 440(a) (11).

Accordingly, we think that the words of Mr. Justice Jackson's majority opinion in the Morton Salt case apply:

> "Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that [appellant's] behavior is consistent with the law and the public interest."

Order affirmed.

Mr. Justice Cohen filed a dissenting opinion, in which Mr. Justice Eagen joined.

DISSENTING OPINION

Cohen, J., Filed: November 12, 1970.

The State Real Estate Commission, under the majority's opinion, is permitted to impose sanctions on a broker who attempted to withstand a warrantless invasion of his privacy. As early as 1886, in Boyd v. United States, 116 U.S. 616, 29 L. Ed. 745 (1886) the United States Supreme Court held that Fourth Amendment protections extend in civil, as well as criminal, actions. More recently, in See v. City of Seattle, 387 U.S. 541, 18 L. Ed. 2d 943 (1967), the Court laid down the general rule that the businessman has a constitutional right to go about his business free from unreasonable intrusions by governmental officials on his business property and that that right is jeopardized by allowing the official in the field to enforce the regulatory laws without official authority evidenced by a warrant.[1]

[1]Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 18 L. Ed. 2d 930 (1967), was the companion case to See. That case held that an individual, in his residence, has the right to insist that government inspectors, e.g., housing code inspectors or fire department inspectors, obtain a warrant to search and that an individual may not be constitutionally convicted for refusing to consent to a warrantless inspection of his residence by such official. See thus served to extend that requirement to business premises. See also United States v. Stanack Sales Co., Inc., 387 F. 2d 849 (3d Cir. 1968) where the Third Circuit held that the Fourth Amendment protections enunciated in See v. City of Seattle extend to business records, at least requiring a carefully delimited subpoena to obtain them.

"It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. [citing in footnote, *inter alia*, Federal Trade Commission v. Morton Salt Co., 338 U.S. 632 (1960); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 632 (1945)]. *The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena.* . . . [T]he subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.

". . . The agency's particular demand for access will of course be measured in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field." Id. at 544-45, 18 L. Ed. 2d at 947. (Emphasis supplied.)

The most recent decision in this area is The Colonnade Catering Corp. v. United States, 397 U. S. 72, 25 L. Ed. 2d 60 (1970). Colonnade was a licensed New York liquor dealer whose premises were inspected for possible violation of federal law by federal agents acting without a search warrant. The inspection provisions of

the statute invoked provided for a $500 fine to be imposed upon any retail liquor dealer who refused to allow agents to inspect his premises. Colonnade refused the agency entry into a locked storeroom and the inspectors broke the lock and seized bottles of liquor. The district court ordered the seized bottles returned and suppressed as evidence, but the court of appeals for the second circuit reversed. The Supreme Court reversed the second circuit and held that since Congress selected a standard for enforcing the inspection provisions of the statute which did not include forcible entry without a warrant, such procedure may not be allowed and the licensee should have been fined as required by the statute. The Supreme Court decided that Congress has broad power to establish inspection procedure under the liquor laws because of the long recognized interest of governmental control in the liquor industry and the equally long history of governmental regulation in the field. The Supreme Court then reaffirmed its holding in See v. City of Seattle, for areas other than the liquor industry.

It is thus clear that a subpoena or warrant is required when an administrative agency wishes to inspect business premises, books and records, even if required to be kept by statute. The Real Estate Brokers License Act does contain a subpoena provision, §13, 63 P.S. §443, but that was not used here. The Commission has the duty to insure compliance with the Act, but that duty does not authorize circumvention of the Fourth Amendment's guarantee that a person be secure in his person, house and effects. Thus, appellant's license could not be constitutionally suspended because of his refusal to accede to the warrantless demand of the Commission's investigator in the field.

The majority does not concern itself with the constitutionality of the inspection procedure alone, however, because they also hold that acceptance of a broker's license constitutes a waiver of constitutional rights. The United States Supreme Court has not recognized that theory, however, and has in fact held that mere acceptance of a license is not such a waiver. Spevack v. Klein, 385 U.S. 511, 17 L. Ed. 2d 574 (1967). See also, Garrity v. State of New Jersey, 385 U.S. 493, 17 L. Ed. 2d 562 (1967); Gardner v. Broderick, 392 U.S. 273, 20 L. Ed. 2d 1082 (1968). It has long been recognized that a waiver of constitutional rights must be knowing, intelligent and voluntary. Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461 (1938). Even Shapiro v. United States, 335 U.S. 1, 92 L. Ed. 1787 (1948), involved the production of records pursuant to a subpoena. If a policeman, Garrity v. New Jersey, supra, and a lawyer, Spevack v. Klein, supra, and a teacher, Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551, 100 L. Ed. 692 (1956), "are not relegated to a watered-down version of constitutional rights", 385 U.S. at 500, 17 L. Ed. 2d at 567, we should not hold that a real estate broker is. A waiver of constitutional protection may not be implied from the mere acceptance of a license, nor may it be forced upon a licensee in such a manner as to make the exercise of his constitutional rights costly. Spevack v. Klein, supra; Griffin v. State of California, 380 U.S. 609, 14 L. Ed. 2d 106 (1965). Here, a waiver is not present and the exercise of a constitutional right is made costly. Such action should not be permitted.

Dissenting Opinion

I would reverse the Commission's order and reinstate appellant's license.

I dissent.

Mr. Justice Eagen joins in this dissenting opinion.

PENNSYLVANIA REAL ESTATE BROKERS LICENSE ACT

§440. INVESTIGATION OF COMPLAINTS; GROUNDS OF SUSPENSION OR REVOCATION OF LICENSES; HEARINGS; REVIEW

(a) The commission may, upon its own motion, and shall, promptly, upon the verified complaint in writing of any person setting forth specifically the wrongful act or acts complained of, investigate any action or business transaction of any licensed real estate broker or real estate salesman; and shall have the power temporarily to suspend or permanently to revoke licenses theretofore issued by the department, under the provisions of this act, at any time when, after due proceedings as hereinafter provided, it shall find the holder thereof to have been guilty.

(1) Of knowingly making any substantial misrepresentation; or

(2) Of knowingly making any false promise of a character likely to influence, persuade or induce; or

(3) Of a continued or flagrant course of misrepresentation, or making of false promises through agents or salesmen; or

(4) When it shall be shown that the licensee, within five years prior to the issuance of the license then in force, has pleaded guilty, entered a plea of nolo contendere, or has been found guilty in a court of competent jurisdic-

tion of this or any other state of forgery, embezzlement, obtaining money under false pretenses, extortion, conspiracy to defraud, bribery, or other like offense or offenses.

(5) Of any failure to account for, or to pay over, moneys belonging to others, which has come into his, her, or its possession arising out of a real estate transaction; or

(6) Of any misleading or untruthful advertising; or

(7) Of any act or conduct in connection with a real estate transaction which demonstrates incompetency, bad faith, or dishonesty;

(8) Of displaying a "for rent" or "for sale" sign on any property without an exclusive agency therefor or without the owner's consent;

(9) Of failing to furnish voluntarily a copy of the agreement of sale to the buyer and the seller, and a copy of the lease to the lessor and lessee;

(10) Of buying a property listed through a straw party with the intent of reselling to a buyer already secured thus making a profit in addition to the commission agreed upon with the owner listing the property;

(11) Of failure to comply with the following requirements:

(i) All deposits or other moneys accepted by every person, copartnership, corporation or association, holding a real estate broker's license under the provisions of this act, must be retained by such real estate broker pending consummation or termination of the transaction involved, and shall be accounted for in the full amount thereof at the time of the consummation or termination.

(ii) Every real estate salesman promptly on receipt by him of a deposit or moneys on any transaction in which he is engaged on behalf of his broker-employer, shall pay over the deposit to the real estate broker.

(iii) A real estate broker shall not commingle the money or other property of his principal with his own.

(iv) Every real estate broker shall immediately deposit such moneys, of whatever kind or nature, belonging to others, in a separate custodial or trust fund account maintained by the real estate broker with some bank or recognized depository until the transaction involved is consummated or terminated, at which time the real estate broker shall account for the full amount received. Under no circumstances shall a real estate broker permit any advance payment of funds belonging to others to be deposited in the real estate broker's business or personal account, or to be commingled with any funds he may have on deposit.

(v) Every real estate broker shall keep records of all funds deposited therein, which records shall indicate clearly the date and from whom he received money, the date deposited, the dates of withdrawals, and other pertinent information concerning the transaction, and shall show clearly for whose account the money is deposited and to whom the money belongs. All such records and funds shall be subject to inspection by the commission. Such separate custodial or trust fund account shall designate the real estate

broker, as trustee, and such account must provide for withdrawal of funds without previous notice.

(12) Of failure to provide his client with a fully executed copy of any sole or exclusive sales listing contract at the time of the execution thereof.

(13) Of failure to truthfully disclose information sought in the application for license.

(14) Of accepting listings on an understanding that illegal discrimination in the sale or rental of housing is to be practiced due to race, color, religious creed, ancestry or national origin of a prospective lessee or purchaser.

(15) Of giving false information for purposes of discrimination in the rental or sale of housing due to race, color, religious creed, ancestry or national origin of a prospective lessee or purchaser.

(16) Of making distinctions in location of housing or dates of availability of housing for purposes of discrimination in the rental or sale of such housing due to race, color, religious creed, ancestry or national origin of a prospective lessee or purchaser.

(17) Of violating the provisions of the act of October 27, 1955 (P. L. 744), known as the "Pennsylvania Human Relations Act,"[1] or if he deals in a discriminatory manner with any individual desiring to rent or purchase housing accommodations because of the person's race, religious creed, or national origin.

(18) An appeal from the decision of the State Real Estate Commission shall act as a supersedeas and stay any action until a final decision on said appeal.

(b) Before refusing, suspending or revoking any license, the commission shall, in writing, notify the appli-

cant or licensee of the charges against him, accompanying the notice with a copy of the complaint, if any filed, and the commission shall accord the applicant or licensee ample opportunity to be heard thereon in person or by counsel. If the applicant or licensee shall so desire, the commission shall grant a hearing upon such charges, to be held on not less than ten (10) days prior notice in writing to the applicant or licensee given. At such hearing, the applicant or licensee shall be entitled to examine, either in person or by counsel, any and all persons complaining against him, and as well as other witnesses whose testimony is relied upon to substantiate the charges made. He shall also be entitled to present such evidence, oral and written, as he may see fit, and as may be pertinent to the inquiry. The said hearings may be held by the commission, or any member thereof, or by any of its duly authorized representatives, or by any other person duly authorized by the commission for such purpose in any particular case. At such hearings, all witnesses shall be duly sworn by the duly authorized representatives, general or special, before whom the hearing is held, and stenographic notes of the proceedings shall be taken and filed as part of the record in the cause with the commission. When a matter is referred to a representative of the commission for hearing, such person following the completion of the testimony in the hearing before him shall file a report with the commission setting forth his findings of fact and recommendation. The commission may adopt the findings in the report or may, with or without additional testimony, either return the matter to the representative for such further consideration as the commission deems necessary or make additional further or other findings of fact on the basis of

all the legally probative evidence in the record and enter its conclusions of law and order in accordance with the requirements for the issuance of an adjudication under the Administrative Agency Law the Act of June 4, 1945 (P. L. 1388), section 1, as amended.[2] Any party to the proceedings desiring it shall be furnished with a copy of such stenographic notes, upon the payment to the department of such fee as it shall, by general rule or regulation, prescribe therefor, not exceeding however fifty cents per folio.

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(d) The decision of the commission in suspending or revoking any license issued under this act shall be subject to review by the court of common pleas of Dauphin County.

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Within thirty (30) days after the service of such notice of appeal, the commission shall file with the prothonotary of the said court of common pleas a transcript of the records of the proceedings in its office, duly certified over the seal of the department, which record shall include all papers on file with the commission affecting or relating to the inquiry or investigation conducted by the commission, and all the evidence taken in the said hearing, including the stenographic notes of testimony.

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§443. OATHS; SUBPOENAS; PROCESS; WITNESS FEES; ENFORCING ATTENDANCE; TAKING TESTIMONY

(a) The commission, and each of its duly authorized representatives, and as well any special representative ap-

pointed by it to hold a hearing in any particular case, shall have power to administer oaths, and to issue subpoenas for the attendance of witnesses and the production of books and papers. In any hearing in any part of the Commonwealth, the process issued by the commission shall extend to all parts of the Commonwealth, and such process shall be served, either in like manner as are served writs of subpoena in the court of common pleas, or by any person designated by the commission for such purpose. The person serving such process shall receive such compensation as may be allowed by the commission, not to exceed the fee prescribed by law for similar services in the courts of common pleas, and such fees shall be paid in the same manner as provided herein for the fees of witnesses subpoenaed at the instance of the commission. All witnesses who shall be subpoenaed, and who shall appear in any proceeding before the commission, shall receive the same fees and mileage as allowed by law to witnesses in the court of common pleas, which amount shall be paid by the party at whose instance the subpoena was issued or upon whose behalf the witness has been called. When any witness who has not been subpoenaed at the instance of any party to the proceedings shall be subpoenaed at the instance of the commission, or its representatives, general or special, the fees and mileage of such witness shall be paid from the funds appropriated to the use of the said department in the same manner as other expenses of the department are paid.

(b) Where in any proceeding before the commission, any witness shall fail or refuse to attend upon subpoena issued by the commission, or any of its representatives, general or special, or appearing shall refuse to testi-

fy, or shall refuse to produce any books and papers the production of which is called for by the subpoena, the attendance of such witness and the giving of his testimony and the production of the books and papers required shall be enforced by any court of common pleas of this Commonwealth, in like manner as are enforced the attendance and testimony of witnesses before commissioners appointed by any court of the United States or of any other State to examine or take the testimony of witnesses within this Commonwealth.

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STATE REAL ESTATE COMMISSION RULES OF PRACTICE AND PROCEDURE

Rule 4.1 of the Commission's Rules of Practice and Procedure;

"Upon receipt of a complaint filed under Rule 3.1 above, *or* upon information, the Commission at an official meeting of its members, *shall* vote to determine whether a citation shall be issued against the licensee."

Rule 4.3(3) of the Commission's Rules of Practice and Procedure:

"(3) a clear and concise factual statement sufficient to inform each party with reasonable definiteness of the type of acts or practices alleged to be in violation of the Act or regulations promulgated thereunder. In fixing the times and places for hearings, due regard shall be had for the convenience of the parties and their representatives."

Rule 10.19. A transcript of all testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute an exclusive record for decision under Section 12. Upon such decision, this record shall be available during reasonable business hours for inspection upon request of any party and shall be available to any party at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter. No partial transcripts or transcripts of uncompleted hearings shall be furnished. Where any Commission decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

PENNSYLVANIA ADMINISTRATIVE AGENCY LAW

§1710.44 DISPOSITION OF APPEAL

The court to which the appeal is taken shall hear the appeal without a jury on the record certified by the agency. After hearing, the court shall affirm the adjudication unless it shall find that the same is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of sections thirty-one to thirty-five inclusive of this act[1] have been violated in the proceeding before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may set aside or modify it, in whole, or in part, or may remand the proceeding to the agency for further disposition in accordance with the order of the court. 1945, June 4, P. L. 1388, §44.

[1]Sections 1710.31-1710.35 of this title.

PENNSYLVANIA CONSTITUTION

ART. 1, §1 CONSTITUTION OF 1874

PREAMBLE

We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution.

ARTICLE I

DECLARATION OF RIGHTS

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Sec. 8. Searches and seizures.

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

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§9. RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for

obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.

* * * * * * * * *

UNITED STATES CONSTITUTION

ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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